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No. 85-2010

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, Individually and on behalf of all others similarly situated, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

William H. Ewing
Arnold P. Borish*
Daniel Segal
HANGLEY CONNOLLY EPSTEIN CHICCO FOXMAN & EWING
1429 Walnut Street, 14th Floor
Philadelphia, PA 19102
(215) 864-7724

Counsel for Respondents

Counsel of Record

SMITH-EDWARDS-DUNLAP COMPANY, 3667 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 426-5600

16 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether a union which is aware of widespread employer racial discrimination against its black members violates Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 by deliberately choosing not to enforce non-discrimination clauses contained in its collective bargaining agreement, where that choice serves to perpetuate a discriminatory environment.

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COUNTER-STATEMENT OF THE CASE

After a 32-day trial, the United States District Court for the Eastern District of Pennsylvania held Lukens Steel Company liable under Title VII and 42 U.S.C. § 1981 for intentional discrimination against its black employees as a class in a wide range of employment practices: initial assignment at hire, discharge during the probationary period, promotion to

craft positions, promotion to salaried positions, toleration of racial harassment, and denial of incentive pay to employees in the predominately black "Pits" seniority unit.

The District Court also found that the United Steelworkers of America and its Local Unions 1165 and 2295, the bargaining agents for hourly employees at Lukens, had intentionally discriminated against their black members at Lukens by failing to enforce the non-discrimination provisions in their collective bargaining agreement. The District Court found that the Petitioners had intentionally (1) failed to challenge the discriminatory discharges of probationary employees, (2) failed and refused to assert racial discrimination as a ground for grievances, and (3) tolerated and tacitly encouraged racial harassment. App. at 146a-147a. The District Court stated:

> The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

App. at 138a.

Although the District Court agreed with other courts which have held that "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well," App. at 139a (citations omitted), the court did *not* base its decision on that ground. Rather, it found as follows:

> *[T]he evidence in this case proves far more than mere passivity on the part of the unions.* The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their inter-

> ests. *A union which intentionally avoids asserting discrimination claims*, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed towards minorities.

App. at 139a-140a (emphasis added).

The United States Court of Appeals for the Third Circuit affirmed the District Court's findings against Lukens with respect to discrimination in discharge of employees on probation and in promotions to craft positions and all the District Court's findings against the unions. The Court of Appeals vacated the District Court's findings of discrimination by Lukens in promotion to salaried positions and toleration of racial harassment, and it remanded the case to the District Court for reconsideration of those findings in light of the Court of Appeals' ruling that the proper limitations period for Section 1981 claims was two years, rather than the six-year period applied by the District Court.[1] The Court of Appeals also held that none of the named plaintiffs had standing to assert the claims of discrimination in initial assignment, and it remanded those claims for the District Court to consider the possibility of intervention by other class members to represent the class on those claims.[2] Finally, the Court of Appeals reversed the District Court's finding that Lukens' denial of incentive pay to employees in the "Pits" seniority unit was racially discriminatory.

In affirming the District Court's findings of intentional discrimination by the Petitioners, the Court of Appeals stated:

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1. The Court of Appeals' holding on the applicable statute of limitations is the subject of a pending Petition for Certiorari by the plaintiffs, captioned *Goodman v. Lukens Steel Company*, No. 85-1626.

2. The Court of Appeals' remand on this issue and certain other aspects of its decision are subjects of a Petition for Certiorari by Lukens captioned *Lukens Steel Company v. Goodman*, No. 85-1645.

> The case against the unions here is stronger than mere acquiescence. The district court found that *the unions intentionally avoided asserting claims of discrimination.... The deliberate choice not to process grievances [based on discrimination] ... violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation*. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

App. at 26a-27a (emphasis added).

The evidence upon which these findings were based proved that the union defendants showed two faces to the world. On the national public policy level, the United Steelworkers had been leaders in the fight for civil rights. As early as 1962 the International Union had negotiated a non-discrimination clause in the national collective bargaining agreement which served as the pattern for the Lukens agreement. Subsequently, provisions prohibiting racially biased tests and prohibiting racial discrimination in the discharge of probationary employees were added to the national collective bargaining agreement and the Lukens agreement.

At Lukens, however, Local Unions 1165 and 2295 and the representatives of the International Union who worked with them on contract negotiations and grievance processing had deliberately decided not to enforce the collective bargaining provisions against discrimination. Indeed, in reviewing pre-limitations-period events by way of background (but not as a ground for relief), the District Court found that the 1962 industry-wide non-discrimination clause was not even included in the Lukens collective bargaining agreement negotiated that year; it was not added until 1965, when the *company* rather than the unions suggested it be added. App. at 133a-134a.

As the District Court found, the unions never challenged a discharge of an employee during his probationary period

although the collective bargaining agreement specifically prohibited racial discrimination in such discharges, and the unions "knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites." App. at 137a. Moreover, the unions never objected to Lukens' tests as racially discriminatory, "although the unions were certainly chargeable with knowledge that many of the tests, particularly the Wonderlic, were notorious in that regard." *Id.* Finally, with respect to the general contractual non-discrimination clause (which was belatedly added to the collective bargaining agreement in 1965), the District Court found:

> It is undisputed that the unions were reluctant to assert racial discrimination as a basis for a grievance and almost never did so until after this suit was filed, even though many black employees asserting grievances complained about discriminatory treatment and harassment, and even though the union itself believed that racial discrimination was involved in the grievance.

App. at 138a.

The District Court found that this conduct was intentional. It did not fault the unions for failing to succeed in eliminating racial discrimination at Lukens but rather for deliberately deciding not to try to enforce the provisions of the collective bargaining agreement which were adopted for the benefit of minority employees.

REASONS FOR DENYING THE WRIT

The fundamental flaw in the Petitioners' argument is its disregard of three crucial facts, found by the District Court and affirmed by the Court of Appeals: (1) The applicable collective bargaining agreement contained three clauses explicitly prohibiting discrimination on the basis of race by Lukens, and (2) the Petitioners were aware of such discrimination by Lukens, but (3) the Petitioners deliberately decided not to file grievances for violations of the non-discrimination clauses. Thus, the holdings of the courts below were based on

the unions' intentional avoidance of enforcement of their contractual non-discrimination clauses, *not* on any theory that the unions had a legal duty, apart from their contract, to object to employer discrimination. This avoidance, in the words of the District Court, "rendered the non-discrimination clause in the collective bargaining agreement a dead letter." App. at 138a.

These holdings on "ultimate questions of fact," *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983), can be set aside only if they are "clearly erroneous." See *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1512 (1985). The Petitioners do not claim that they were "clearly erroneous."

The Petitioners have conceded the legal basis for the District Court's decision. Their Petition states as follows:

> A union cannot control management; it can affect management's conduct in running the business only to the extent that it can secure collective bargaining agreements that limit these managerial powers. A union cannot prevent employer discrimination that violates Title VII unless it negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. *And, if it succeeds in obtaining any such contract provisions, it must then expend its resources in the grievance/arbitration procedure to enforce those provisions.*

Petition at 22 (emphasis added).

The holding of the District Court and the affirmance by the Court of Appeals were clearly based on the finding that, although the collective bargaining agreement contained three specific prohibitions of racial discrimination, the unions made a "deliberate choice," App. at 26a, not to "expend [their] resources in the grievance/arbitration process to enforce those provisions." This deliberate choice not only violated the unions' duty of fair representation and their duty to enforce the collective bargaining agreement; it also intentionally discriminated against the black and other minority employees

whom the non-discrimination provisions were intended to protect. *Id.* A union which decides to sacrifice enforcement of non-discrimination provisions "either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white members," App. at 139a-140a, discriminates against its black members. As this Court held in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976):

> The same reasons which prohibit an employer from discriminating on the basis of race among . . . employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.

427 U.S. at 285.

The Petitioners' reliance on *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982), is misplaced because the unions in the present case were found to have the discriminatory intent of which the employers in *General Building Contractors* were innocent. This Court lucidly phrased the issue and its conclusion in *General Building Contractors* as follows:

> The District Court held petitioners liable under § 1981 notwithstanding its finding that *the plaintiffs had failed to prove intent to discriminate on the part of the employers and associations as a class*. In light of our holding that § 1981 can be violated only by intentional discrimination, the District Court's judgment can stand only if liability under § 1981 can properly rest on some ground other than the discriminatory motivation of the petitioners themselves. Both the District Court and respondents have relied on such grounds, but we find them unconvincing.

458 U.S. at 391 (emphasis added).

By contrast, the District Court in the present case found

that the Petitioners had intentionally avoided enforcing the three provisions of the collective bargaining agreement which prohibited discrimination by Lukens, even though they were aware that such discrimination existed.

Section 1981 explicitly guarantees to "all persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." As the Petitioners themselves acknowledge, "unions have the exclusive right to enforce" rights that are embodied in collective bargaining agreements and, accordingly, "are subject to the duty of fair representation, which obligates them to act fairly in exercising their enforcement responsibility." Petition at 20-21. As the District Court found, the Petitioners in the present case deliberately decided not to fulfill their duty to enforce their black members' contractual rights to freedom from discrimination.

Unlike the District Court in *General Building Contractors*, the District Court in the present case did not make the Petitioners "the guarantors of the workers' rights as against third parties who would infringe them." 458 U.S. at 396. It did not hold the Petitioners liable for failure to eradicate discrimination by Lukens; it held them liable only for intentionally refusing to file grievances based on the nondiscrimination clauses in the collective bargaining agreement and thus denying their black employees the right to equal enforcement of that contract.

CONCLUSION

Because the holdings of the District Court and the Court of Appeals were based on the Petitioners' intentional and deliberate refusal to enforce non-discrimination clauses in the collective bargaining agreement, this case does not offer a vehicle for the Court to decide whether Title VII or Section 1981 by itself imposes an affirmative duty on unions to make efforts to prevent employer discrimination. The Petitioners do not claim that the District Court's decision was "clearly erroneous" in holding that the Petitioners' decision was intentional, served to perpetuate the discriminatory environment, and rendered the non-discrimination clause a "dead letter." Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

William H. Ewing
Arnold P. Borish*
Daniel Segal

HANGLEY CONNOLLY EPSTEIN
CHICCO FOXMAN & EWING
1429 Walnut Street, 14th Floor
Philadelphia, PA 19102
(215) 864-7724

**Counsel of Record*

Attorneys for Petitioners